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Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)	
)	
Redesignation of the 17.7-19.7 GHz Frequency)	
Band, Blanket Licensing of Satellite Earth Stations)	IB Docket No. 98-172
in the 17.7-20.2 GHz and 27.5-30.0 GHz)	RM-9005
Frequency Bands, and the Allocation of)	RM-9118
Additional Spectrum in the 17.3-17.8 GHz and)	
24.75-25.25 GHz Frequency Bands for Broadcast)	
Satellite-Service Use)	

THIRD ORDER ON RECONSIDERATION

Adopted: June 1, 2004

Released: June 16, 2004

By the Commission:

I. INTRODUCTION

1. We have before us a petition filed by the Independent MultiFamily Communications Council ("IMCC")¹ seeking reconsideration of, and requesting immediate relief from, the *18 GHz Second Order on Reconsideration*.² In that Order, we altered the 18 GHz band³ plan by, among other things: (1) reallocating the 18.3-18.58 GHz band on a primary basis for fixed-satellite service ("FSS"), and (2) adopting provisions to ensure the orderly migration and timely reimbursement of terrestrial fixed service ("FS") incumbents in the 18.3-18.58 GHz band.⁴ For the reasons set forth below, we deny the IMCC's Petition and deny its request for immediate relief.

II. BACKGROUND

2. On September 18, 1998, the Commission proposed, in the *18 GHz Notice of Proposed*

¹ Petition for Reconsideration and Emergency Request for Immediate Relief, submitted by the Independent MultiFamily Communications Council (May 8, 2003) ("Petition").

² *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Second Order on Reconsideration, 17 FCC Rcd 24248, 24251-57, ¶¶ 9-19 (2002), modified by Erratum, 18 FCC Rcd 820 (2003) ("*18 GHz Second Order on Reconsideration*").

³ The term "18 GHz band" refers to those frequencies between the 17.7 and 19.7 GHz. *18 GHz Second Order on Reconsideration*, 17 FCC Rcd at 24248, n.2. Pursuant to footnote US334 of the United States Table of Frequency Allocation, U.S. geostationary and non-geostationary satellite systems in the fixed satellite service are authorized to operate in the 17.8-20.2 GHz band. Coordination between these Government operations and non-Government operations, both terrestrial and satellite continue and will remain in effect. Nothing in this Order changes the relationship between Government and non-Government systems. *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite Service in the 17.8-20.2 GHz Band for Government Use*, Memorandum Opinion and Order, 10 FCC Rcd 9931 (1995).

⁴ *18 GHz Second Order on Reconsideration*, 17 FCC Rcd at 24248-49, ¶ 1.

Rulemaking, to reallocate portions of the 18 GHz band among various services in order to promote more efficient and better use of this spectrum band.⁵ At that time, the 18 GHz band was allocated on a co-primary basis to many different services, including terrestrial FS and geostationary orbiting FSS.⁶ Because FSS licensees planned to deploy potentially millions of small antenna earth stations, the Commission sought comment on the feasibility of shared use of this spectrum band between terrestrial FS and ubiquitously deployed FSS earth stations.⁷ The Commission tentatively concluded that the public interest would be best served by separating into dedicated sub-bands terrestrial FS operations from ubiquitously deployed FSS earth station operations.⁸

3. The Commission released the *18 GHz Order* on June 22, 2000, in which it concluded that separating FS operations from ubiquitously deployed FSS earth stations served the public interest.⁹ The Commission, thus, allocated separate sub-bands to each service,¹⁰ and adopted certain relocation rules that allowed FSS licensees to enter into negotiations with FS licensees in the 18.58-19.3 GHz band for the purpose of agreeing to terms under which the terrestrial licensees would either relocate or accept a sharing agreement.¹¹ Notwithstanding its decision to separate FS and FSS operations in the 18 GHz band, the Commission retained co-primary allocations for FSS and FS operations in the 18.3-18.58 GHz band because “no other spectrum [was] available” to relocate incumbent FS operators and accommodate reasonable FS expansion.¹² By doing so, the Commission limited the amount of spectrum designated for exclusive, primary use by GSO FSS to 720 megahertz, rather than 1000 megahertz, for the provision of certain satellite services.¹³ The Commission explained that retaining these co-primary allocations represented the most “equitable and balanced approach to meeting the current needs of the various

⁵ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Notice of Proposed Rulemaking, 13 FCC Rcd 19923 (1998) (“*18 GHz Notice of Proposed Rulemaking*”).

⁶ The 18 GHz band was allocated as follows: (1) the 17.7-18.8 GHz band for GSO FSS and FS co-primary use, (2) the 18.8-19.3 GHz band for non-geostationary orbiting (“NGSO”) FSS and FS co-primary use, (3) the 19.3-19.7 GHz band for mobile satellite service (“MSS”) feeder link and FS co-primary use, (4) and the 19.7-20.2 GHz band for GSO FSS primary use. *18 GHz Notice of Proposed Rulemaking*, 13 FCC Rcd at 19928-30, ¶¶ 6-9 (citing *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service*, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd 19005 (1996)).

⁷ *18 GHz Notice of Proposed Rulemaking*, 13 FCC Rcd at 19923, ¶ 1.

⁸ *Id.*

⁹ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Report and Order, 15 FCC Rcd 13430-31, 13436, at ¶¶ 2, 11 (2000) (“*18 GHz Order*”), *aff'd sub nom. Teledesic, LLC v. FCC*, 275 F.3d 75 (D.C. Cir. 2001).

¹⁰ *Id.* at 13443-56, ¶¶ 28-54.

¹¹ *Id.* at 13467-70, ¶¶ 76-84; 47 C.F.R. § 101.85 (2002).

¹² *18 GHz Order*, 15 FCC Rcd at 13446-47, ¶¶ 33, 35 n.26; *see also, Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.3 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite Service Use*, Order, 14 FCC Rcd 3086 (1999).

¹³ *See 18 GHz Order*, 15 FCC Rcd at 13459, ¶ 59.

existing and future operations in the 18 GHz band.”¹⁴

4. On November 6, 2000, Teledesic LLC (“Teledesic”) filed a petition for review of the Commission’s *18 GHz Order* with the United States Circuit Court of Appeals for the D.C. Circuit.¹⁵ Hughes Electronics Corporation (“Hughes”), the Fixed Wireless Communications Coalition (“FWCC”) and Winstar Communications, Inc. (“Winstar”), in turn, filed separate petitions seeking reconsideration of the Commission’s *18 GHz Order*.¹⁶

5. The Commission released the *18 GHz Order on Reconsideration* on November 1, 2001, which resolved a number of issues raised in petitions filed by Hughes, the FWCC, and Winstar, as well as certain arguments raised by Teledesic before the Court of Appeals for the D.C. Circuit.¹⁷ However, the Commission deferred acting on Hughes’s requests to reconsider the co-primary allocation for the FS in the 18.3-18.58 GHz band and permit blanket licensing of earth stations receiving in certain portions of the 18 GHz band.¹⁸

6. On December 28, 2001, the Court of Appeals for the D.C. Circuit denied Teledesic’s petition for review of the *18 GHz Order* and those elements of Teledesic’s petition not rendered moot by the *18 GHz Order on Reconsideration*.¹⁹ Notably, the court upheld the relocation policies and procedures adopted in the *18 GHz Order* that Teledesic had challenged. The court concluded that the Commission’s decisions in *18 GHz Order* were entitled to a heightened degree of deference traditionally accorded decisions regarding spectrum management.²⁰ The court also found that the Commission’s spectrum management goals and the regulatory means used to implement the policies and procedures in the *18 GHz Order* were permissible and reasonable, and the rules’ safeguards against unreasonable bargaining by terrestrial operators during the relocation process were adequate.²¹

¹⁴ *18 GHz Order*, 15 FCC Rcd at 13444, ¶ 30. Because the Commission retained co-primary allocations for GSO FSS and FS in the 18.3-18.58 GHz band, relocation rules were not adopted for the 18.3-18.58 GHz band.

¹⁵ *Teledesic LLC v. FCC*, Petition for Review, Case No. 00-1466 (D.C. Cir. filed Nov. 6, 2000) (“Teledesic Petition”); see generally *Teledesic v. FCC*, 275 F.3d 75 (2001). Teledesic challenged, among other things, the relocation rules adopted for the 18 GHz band and certain aspects of the *18 GHz Order*, which related to exemptions for low-power stations and stations in the 19.26-19.3 GHz band. *Id.*

¹⁶ Petition for Partial Reconsideration, submitted by Hughes Electronics Corporation (Oct. 6, 2000) (Hughes Petition); Petition for Reconsideration, submitted by the Fixed Wireless Communications Coalition (Sept. 29, 2000); Petition for Clarification and Reconsideration, submitted by Winstar Communications, Inc. (Oct. 10, 2000). The Commission requested the Court of Appeals for the D.C. Circuit to hold in abeyance the case brought by Teledesic because Hughes, FWCC, and Winstar filed petitions for reconsideration of the *18 GHz Report and Order*. *Id.* A panel of the Court of Appeals for the D.C. Circuit denied the Commission’s request. See *Teledesic, LLC v. FCC*, 2001 WL 79748, No. 00-1466 (D.C. Cir. Jan. 31 2001).

¹⁷ Specifically, the Commission cut-off further low-power applications under section 101.147(r)(10) as of April 1, 2002, and permitted low-power services, authorized pursuant to section 101.147(r)(10), to continue to operate on a co-primary basis for a period of ten years, subject to reimbursed relocation at the request of the satellite provider. *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, First Order on Reconsideration, 16 FCC Rcd 19808 (2001) (“*18 GHz Order on Reconsideration*”).

¹⁸ *Id.* at 19816-17, ¶ 15; Hughes Petition at 5-18.

¹⁹ *Teledesic*, 275 F.3d at 75, 85.

²⁰ *Id.* at 84-85.

²¹ *Id.* at 85-87.

7. As part of an effort to enable the vast majority of FS operators in the 18.3-18.58 GHz band to access other spectrum, the Commission adopted the *CARS Eligibility Order* on May 16, 2002.²² In that Order, the Commission permitted all multichannel video programming distributors ("MVPDs"), including private cable operators ("PCOs"), to become eligible for licenses in the Cable Television Relay Service ("CARS") in the 12.7-13.2 GHz lower and 18 GHz upper CARS bands.²³ This action reversed the Commission's longstanding policy that had allowed franchised cable systems and wireless cable systems to become CARS licensees, but denied the same opportunity to non-eligible competitors to traditional cable systems, such as PCOs.

8. On November 26, 2002, the Commission released the *18 GHz Second Order on Reconsideration*, in which the Commission addressed, among other things, the unresolved arguments raised in the Hughes Petition.²⁴ In that Order, the Commission altered the 18 GHz band plan to make FSS the sole primary spectrum allocation in the 18.3-18.58 GHz band to further promote the efficient use of this spectrum for existing and future users.²⁵ The Commission also adopted relocation rules to ensure the orderly migration and timely reimbursement of FS operators in the 18.3-18.58 GHz band.²⁶ By doing so, the Commission granted to GSO FSS an exclusive 1000 megahertz allocation while providing PCOs the opportunity to remain competitive in the MVPD market.²⁷ The Commission explained that its spectrum allocation decisions were based on public interest considerations and on the identification of alternative relocation spectrum in the lower and upper CARS bands for displaced MVPDs,²⁸ as well as a study conducted by the Office of Engineering and Technology ("OET CARS Band study"), which concluded that sufficient capacity exists in the lower and upper CARS bands to reasonably accommodate displaced MVPD licensees.²⁹

²² *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd 9930 (2002) ("*CARS Eligibility Order*").

²³ *Id.* at 9930, ¶ 1. We use the term "12 GHz band" to refer specifically to the frequency spectrum between 12.7-13.2 GHz. We note that the lower CARS band is shared with Broadcast Auxiliary Stations ("BAS") electronic news gathering ("ENG") operations. 47 C.F.R. §§ 74.600-74.690 (2002). The upper CARS band is shared with fixed microwave licensees. 47 C.F.R. §§ 2.106, 78.106, 101.101. Further, FS licensees are predominant in the upper CARS band.

²⁴ Hughes Petition. The Satellite Industry Association ("SIA") also filed a Petition for Reconsideration. Petition for Reconsideration, submitted by the SIA (Jan. 7, 2002).

²⁵ We also permitted the blanket licensing of GSO FSS facilities in the 18.3-18.58 GHz band. *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24256-58, ¶¶ 20-22.

²⁶ Specifically, we extended the applicability of our existing 18 GHz band relocation procedures to the 18.3-18.58 GHz band. 47 C.F.R. §§ 101.85-101.97.

²⁷ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24256, ¶ 19.

²⁸ In addition to the 12 GHz and 18 GHz bands, incumbent FS licensees in the 18.3-18.58 GHz band are also generally eligible to obtain licenses for private operational fixed point-to-point microwave ("OFS") licenses in the 23 GHz band. *CARS Eligibility Order*, 17 FCC Rcd at 9937, ¶ 18. Additionally, they may utilize a host of alternative media that may constitute "comparable facilities" under our rules, such as satellite facilities. *18 GHz Second Order on Reconsideration*, 16 FCC Rcd at 19834-35 ¶ 61 ("comparable facilities" include "whatever comparable facilities are available, including alternative media").

²⁹ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24252-53, 24255, ¶¶ 11-13, 17. The Commission recently released the *Rechannelization Notice of Proposed Rulemaking* that sought comment on the rechannelization of the 17.7-19.7 GHz band in an effort to promote effective utilization of the portion of the band that is designated for use by terrestrial FS. *Rechannelization of the 17.7-19.7 GHz Frequency Band for Fixed Microwave Services under Part 101 of the Commission's Rules*, WT Docket No. 04-143, Notice of Proposed Rulemaking, FCC 04-77 (rel. April 19, 2004).

9. The IMCC submitted a Freedom of Information Act request³⁰ for the OET CARS Band study on December 20, 2002.³¹ On January 21, 2003, the International Bureau ("Bureau") provided the IMCC with a copy of the study.³²

10. On May 8, 2003, the IMCC submitted the instant Petition seeking reconsideration and requesting immediate relief from our allocation decisions made in the *18 GHz Second Order on Reconsideration*.³³ The IMCC requests that we restore the co-primary allocation for FS and GSO FSS in the 18.3-18.58 GHz band, reinstate *nunc pro tunc* all FS applications pending as of November 19, 2002, and accept new applications for FS systems. Alternatively, the IMCC requests that we reinstate *nunc pro tunc* all FS applications at 18.3-18.58 GHz pending as of November 19, 2002, and accept applications for new FS systems at 18.3-18.58 GHz.³⁴

11. The International Bureau placed the OET CARS Band study on the Commission's website on July 8, 2003 to provide parties that wished to comment on the IMCC's Petition access to the study.³⁵

12. The Satellite Industry Association ("SIA") filed an opposition to the IMCC's request for emergency relief³⁶ and an opposition to the IMCC's Petition.³⁷ The IMCC, subsequently, submitted replies to these oppositions.³⁸ In its opposition, the SIA concurred with the results of the OET study.³⁹

III. DISCUSSION

13. Under the Commission's rules, we may entertain a petition for reconsideration if it is based

³⁰ 5 U.S.C. § 552.

³¹ Email from William J. Burhop, Executive Director of the Independent MultiFamily Communications Council to the FOIA address of the Federal Communications (Dec. 20, 2002, 12:03:00 PM EST) (on file with the author).

³² Letter from Thomas P. Sullivan, Assistant Bureau Chief for Management, International Bureau, to William J. Burhop (January 21, 2003).

³³ Petition at 3-4, 18-20.

³⁴ The IMCC suggests applications for new FS systems at 18.3-18.58 GHz be accepted once the applicant, by affidavit, shows that 1) the application was substantially complete on November 19, 2002, and would have been filed soon thereafter but for the application cut-off on that date, and (ii) comparable facilities, as defined in Section 101.75(b), cannot be coordinated and constructed at comparable cost in another band. Petition at 19.

³⁵ *International Bureau Places Study of the upper and lower CARS Bands, 12.7-13.2 and 17.74-18.42, on the Commission's Website*, Public Notice, DA 03-2227, 18 FCC Rcd 13165 (2003); OET CARS Band study, available at <http://www.fcc.gov/oet/info/documents/#18GHz>.

³⁶ Opposition to Emergency Request for Immediate Relief, submitted by the Satellite Industry Association (May 15, 2003) ("SIA Opposition to Emergency Request"). The SIA submitted its Opposition on May 15, 2003 to comply with the filing requirements specified in section 1.45(d) of our rules. 47 C.F.R. § 1.45(d). SIA Opposition to Emergency Request at 1.

³⁷ Opposition to Petition for Reconsideration, submitted by the Satellite Industry Association (July 10, 2003) ("Opposition to Petition").

³⁸ Reply to Opposition by Satellite Industry Association, submitted by the IMCC (June 3, 2003) ("Reply to Opposition"); Reply to Opposition to Petition for Reconsideration, submitted by the IMCC (July 23, 2003) ("Reply to Opposition to Petition"). Although section 1.45(d) of the Commission's rules do not specifically permit a party to submit a reply to an opposition to a request for emergency relief, in this case, we consider the IMCC's Reply to SIA's Opposition in order to fully develop the record. 47 C.F.R. § 1.45(d) (2002).

³⁹ See Opposition to Petition at 10-12.

on new evidence or changed circumstances, or if reconsideration is in the public interest.⁴⁰ In this case, we find that our decision in the *18 GHz Second Order on Reconsideration* to allocate the 18.3-18.58 GHz band on a primary basis for FSS and to adopt relocation provisions for terrestrial FS incumbents in the 18.3-18.58 GHz band constitutes a changed circumstance that allows us to consider the IMCC's Petition.⁴¹ After reviewing the record before us, however, we conclude that the IMCC has not offered a compelling basis upon which reconsideration or emergency relief may be granted. We, therefore, deny the IMCC's Petition and request for emergency relief and affirm our conclusion that allocating the 18.3-18.58 GHz band on a primary basis for FSS and adopting relocation rules ensures the orderly migration and timely reimbursement of FS incumbents in the 18.3-18.58 GHz band and furthers the public interest.

A. Petition for Reconsideration

14. The IMCC requests reconsideration of our allocation decision in the *18 GHz Second Order on Reconsideration* alleging that our decision was based on a flawed OET CARS Band study that erroneously concluded that the lower and upper CARS bands⁴² will reasonably accommodate the needs of PCO providers.⁴³ According to the IMCC, portions of the lower and upper CARS bands are either heavily congested or by themselves cannot accommodate PCO needs.⁴⁴ In support of its arguments, the IMCC presents interference studies that conclude that seventy percent of the links in the 18.14-18.58 GHz band cannot be relocated to the 17.7-18.14 GHz band.⁴⁵ Additionally, the IMCC contends that relocation would cause competitive harm to PCOs and that our relocation rules for the 18.3-18.58 GHz band would not adequately address the needs of displaced PCOs.⁴⁶

15. **Reallocation of the 18 GHz band.** The IMCC incorrectly presumes that our decision to allocate the 18.3-18.58 GHz band on a primary basis for FSS and adopt relocation rules is based solely on the results of a "flawed" OET CARS Band study.⁴⁷

16. As explained in the *18 GHz Second Order on Reconsideration*, the OET CARS Band study reviewed the potential for relocating actual incumbent licensees in the 18.3-18.58 GHz band to other

⁴⁰ 47 C.F.R. § 1.429(b) (2003).

⁴¹ *Id.* We do not agree with the SIA's contention that the IMCC's Petition should be dismissed as repetitious and untimely. SIA Opposition to Petition, at 5-6. We find that the IMCC's Petition for Reconsideration is a properly filed challenge to our allocation decisions in the *18 GHz Second Order on Reconsideration*.

⁴² Other spectrum bands and media, however, may be used as comparable facilities. *See supra*, n.28.

⁴³ Petition at 9, 13, Attachment 1; Reply to Opposition to Petition; Reply to Opposition. Although the primary focus of the IMCC is the "inadequacy" of the lower and upper CARS bands, the IMCC also contends in its Reply that the 23 GHz band, optic cable, and satellite facilities are similarly inadequate. *See, e.g.*, Reply to Opposition, at 5-6.

⁴⁴ Petition at 9-10, Attachment 1. Specifically, the IMCC argues that: (1) the 12.7-13.2 GHz band is heavily congested and of minimal value to PCOs, (2) the 17.7-18.14 GHz band cannot accommodate PCOs, and (3) the 18.14-18.3 GHz band cannot accommodate PCO needs without an additional 280 MHz of spectrum. Petition at 13.

⁴⁵ Petition at 10, Attachments 1-3. We note that the Comsearch study did not present any analysis indicating that the 12.7-13.2 GHz band, the 21.2-23.6 GHz band, or satellite links cannot accommodate displaced PCOs.

⁴⁶ *Id.*

⁴⁷ Petition at 9 ("The Order's rationale and justification for its decisions are based on the assertions that alternative spectrum, the lower CARS band from 12.7-13.2 GHz, has been made available to PCO use and that additional spectrum, the upper CARS band from 17.7-18.142, will also now be available for PCO. Of critical importance is that the Order bases its conclusions on studies or analyses performed by the Office of Engineering Technology (OET) which assert that this alternative, collective spectrum should adequately accommodate PCO demand.").

spectrum including the lower and upper CARS bands.⁴⁸ The study considered the level of congestion and the frequency paths of existing incumbents in the lower and upper CARS bands. It concluded that the vast majority of the 1,473 PCO links in the 18 GHz band could be accommodated in the lower and upper CARS band.⁴⁹ Specifically, the study determined that if PCO systems were relocated to the lower and upper CARS bands, the geographic separation of the incumbent systems would produce relatively few instances where the frequency paths would intersect in a way that would require site shielding or other mitigation measures necessary to prevent mutually unacceptable interference.⁵⁰

17. The IMCC has not demonstrated that the OET CARS Band study is flawed such that it could not be reasonably relied upon to identify capacity for displaced MVPD licensees. To dispute the OET study, the IMCC presented studies that examined the feasibility of relocating ten, non-randomly selected, links from the 18.14-18.58 GHz band to the upper CARS band.⁵¹ From this small sample, the IMCC concluded that seventy percent of the links in the 18.14-18.58 GHz band cannot be relocated to the upper CARS band.⁵² The IMCC also challenged the OET CARS Band study methodology.⁵³ The SIA, in turn, presented its own study to rebut the IMCC's conclusion.⁵⁴ The SIA examined ten different PCO links and determined that the bands it examined can be relocated to the CARS band.⁵⁵ The SIA also challenged the technical analysis presented by the IMCC.⁵⁶ After reviewing the evidence presented by the IMCC and the SIA as well as the OET CARS Band study, we are not persuaded that the OET CARS Band study is flawed such that it could not be reasonably relied upon to identify capacity for displaced MVPD licensees. Moreover, notwithstanding the concerns raised about the OET CARS Band study, we are not persuaded that reconsideration is required because the results of the study were but one of many factors we considered in determining that the public interest favored reallocation of the 18.3-18.58 GHz band for FSS.

18. Our decision to reallocate portions of the 18 GHz band on a primary basis to FSS is based on public interest considerations and longstanding precedent consistent with our spectrum management goals of making more efficient use of the spectrum.⁵⁷ The Commission has previously determined that, in general, it is in the public interest to separate FS operations from ubiquitous FSS operations in the 18 GHz band⁵⁸ and to allocate a full 1000 megahertz for GSO FSS in the 18 GHz band.⁵⁹ Indeed, the

⁴⁸ 18 GHz Second Order on Reconsideration, 18 FCC Rcd at 24255, ¶ 17.

⁴⁹ OET CARS Band study, available at <http://www.fcc.gov/oet/info/documents/#18GHz>.

⁵⁰ 18 GHz Second Order on Reconsideration, 18 FCC Rcd at 24255, ¶ 17.

⁵¹ Petition at 10-13, Attachment 1, 2.

⁵² See *supra* n.44. The IMCC argues without much substantiation, in its Reply, that fiber optic and satellite are not economically realistic. We do not find these arguments persuasive. Moreover, as we discuss in paragraphs 19-23, *infra*, we anticipate that our relocation rules will address these concerns.

⁵³ Petition at 11-13. Specifically, the IMCC contends that the OET CARS Band Study failed to consider, among other things, transmitter power levels in the D/U calculations and emission bandwidth of radios in the replacement spectrum. *Id.*, at 11-12, Attachment 2.

⁵⁴ Opposition to Petition at 10-12, Exhibit A. The IMCC, in turn, challenged certain aspects of the SIA study. See Reply to Opposition to Petition; Reply to Opposition.

⁵⁵ *Id.*

⁵⁶ Specifically, the SIA contends that the analysis presented by the IMCC was flawed because it, among other things, did not employ standard industry procedures, excluded large sections of the band from consideration because of the presence of nearby links in the same band, and ignored the possibility of using non-contiguous bands of spectrum and using cross-polarized signals to enhance spectral efficiency. Opposition to Petition at 12, Exhibit A.

⁵⁷ See 18 GHz Order, 15 FCC Rcd. at 13430, ¶ 1.

⁵⁸ See *supra* n.9.

Commission allocated separate sub-bands to certain services⁶⁰ and adopted relocation rules for services in the 18.58-19.3 GHz band to further these public interest objectives.⁶¹ However, because “no other spectrum [was] available” to relocate incumbent FS operators and accommodate reasonable FS expansion, the Commission retained co-primary allocations for FSS and FS operations in the 18.3-18.58 GHz band.⁶² This prevented the Commission from providing the “full 1000 [megahertz] of unshared Ka-band downlink spectrum for GSO FSS operations” and resulted in making only 720 megahertz of exclusive spectrum available for ubiquitously deployed MSS earth station downlinks.⁶³ Under the circumstances, this decision represented the most “equitable and balanced approach to meeting the current needs of the various existing and future operations in the 18 [GHz] band.”⁶⁴

19. Subsequent to this decision, circumstances changed. In the *CARS Eligibility Order*, we amended the Commission’s rules to expand the class of entities eligible for licenses in the CARS bands to include all MVPDs.⁶⁵ Based on the identification of this relocation spectrum, and the OET CARS Band study, which was undertaken only in an abundance of caution, we concluded in the *18 GHz Second Order on Reconsideration* that “sufficient capacity exists in this relocation spectrum to reasonably accommodate most incumbent licensees.”⁶⁶ Accordingly, pursuant to our consideration of the record, our previous findings, and our policy judgment,⁶⁷ we separated FS operations from FSS operations in the 18 GHz band

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⁵⁹ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24252-53, ¶ 12 (noting that allocating matched bands of 1000 megahertz each for GSO FSS downlink and uplinks in the Ka-band will result in, among other things, enhanced delivery of ubiquitous broadband satellite service); see, e.g., *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Report and Order, 11 FCC Rcd 19005, 19029, ¶ 58 (1996) (recounting comments from multiple parties indicating that 1000 megahertz of 28 GHz spectrum represents the “minimum amount of spectrum needed to operate commercially viable GSO FSS systems”).

⁶⁰ See *supra* n.10.

⁶¹ 47 C.F.R. § 101.85 (2002).

⁶² *18 GHz Order*, 15 FCC Rcd at 13446-47, ¶¶ 33, 35, n.26; see also *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.3 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite Service Use*, Order, 14 FCC Rcd 3086 (1999).

⁶³ *18 GHz Order*, 15 FCC Rcd at 13444, ¶ 30.

⁶⁴ *Id.*

⁶⁵ The record developed in the *CARS Eligibility Order* suggests that the 12 GHz band is suitable for PCO licensing, i.e., the effective range for communications at 12 GHz is significantly greater than at 18 GHz, and costs are significantly less for operation in the 12 GHz band than in the 18 GHz band. *CARS Eligibility Order*, 17 FCC Rcd at 9934-38, ¶¶ 13-17.

⁶⁶ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24255, ¶ 17. The study considered the level of congestion and frequency paths of existing systems in the 12 GHz and 18 GHz bands, including the paths of incumbent point-to-multipoint PCOs already located in these bands. In the Order, we explained that while point-to-multipoint PCOs tend to configure their stations in a hub-and-spoke pattern, each of the spokes that comprise a PCO’s system can experience interference only from a discrete range of angles. If the PCOs were relocated to the 12 GHz and 18 GHz bands, the geographic separation of the incumbent systems and the relocated PCOs would produce relatively few instances where the frequency path would intersect in such a way that would require site shielding or other mitigation measures necessary to prevent mutually unacceptable interference. *Id.*

⁶⁷ See *American Tel. & Tel. Co. v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (“[w]hen . . . an agency is obligated to make policy judgments where no factual certainties exist or where facts alone do not provide the answer . . . we require only that the agency so state and go on to identify the considerations found persuasive”).

to accommodate both the needs of GSO FSS and FS providers.⁶⁸ Thus, we concluded that allocating the 18.3-18.58 GHz band on a primary basis for FSS served the public interest and furthered our spectrum management goals. For these reasons, we find that the arguments and evidence presented by the IMCC do not provide a basis to reconsider our reallocation decisions in the *18 GHz Second Order on Reconsideration*.⁶⁹

20. Relocation. The IMCC argues that relocation and our relocation rules do not serve the public interest because they would render the PCO business model unworkable.⁷⁰ Specifically, the IMCC contends that forcing PCOs to relocate would disrupt existing services and adversely affect their ability to service new customers.⁷¹ Additionally, the IMCC contends that relocation will increase the cost of adding new customer sites or services, because such costs will not be mitigated by relocation recovery costs.⁷² We disagree. We recognize that relocation of incumbent FS from 18.3-18.58 GHz band may be difficult to accomplish in some cases. However, the relocation rules that we adopted in the *18 GHz Second Order on Reconsideration* will address the legitimate concerns raised by displaced PCOs.⁷³

21. Our relocation policy is based on public interest considerations and efficient spectrum management.⁷⁴ We have determined that the relocation of incumbents and prompt entry by new service providers in the 18.3-18.58 GHz band best serve the public interest and efficient spectrum management.⁷⁵ Accordingly, we have determined, based on the record before us, that terrestrial incumbents must be relocated. Because the Commission's consistent policy has been to prevent new spectrum users from leaving displaced incumbents with a sum of money too small to allow them to resume operations at a new location,⁷⁶ we adopted, in the *18 GHz Second Order on Reconsideration*, certain relocation rules to address issues raised by the relocation of incumbent PCOs. This ensures a seamless handoff from a PCO's existing facilities to its replacement facilities.⁷⁷

⁶⁸ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24251-56, ¶¶ 9-19.

⁶⁹ We concluded based on the comments on the record in the *CARS Eligibility Order*, that "frequency coordination will address all potential interference problems . . ." in the 12 GHz CARS band. *CARS Eligibility Order*, 17 FCC Rcd at 9942, ¶ 30.

⁷⁰ Petition at 14-20; Reply at 5.

⁷¹ Petition at 13-18. We anticipate these relocation rules will address the IMCC's concerns about the contiguity of spectrum in the 12 GHz band as well as the need to migrate to newer technologies.

⁷² Petition at 9-13; Reply at 1-6. In particular, the IMCC contends that the "comparable facilities" test cannot be met, and even if it could be met, would require significant expense for new entrants and comparable companies. Petition, at 13.

⁷³ *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24255-56, ¶ 18.

⁷⁴ *Id.* at 24264, ¶ 31.

⁷⁵ See e.g., *18 GHz Order*, 15 FCC Rcd 13430-31, 13436, at ¶¶ 2, 11; *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24252-53, 24255, ¶¶ 11-13, 17.

⁷⁶ See, e.g., *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for the Use of Mobile Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, 12352, ¶ 109 (2000) (expressing the Commission's view, dating from the *Emerging Technologies* proceeding, that existing operations should not be disrupted during the transition to emerging technologies).

⁷⁷ *18 GHz Order*, 15 FCC Rcd at 13469, ¶ 82; *First Order on Reconsideration*, 16 FCC Rcd at 19838, ¶ 70; see, e.g., *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6595, ¶ 16 (1993) (noting that incumbents that are forced to relocate involuntarily will not incur any costs as a result of the forced relocation and may even benefit in some instances if their aging technology is replaced with new equipment that uses new technology).

22. Under the relocation rules we adopted in the *18 GHz Second Order on Reconsideration*, FS licensees currently operating in the 18.3-18.58 GHz band may continue to operate existing facilities for ten years, subject to the right of the GSO FSS operator to relocate the FS facility to a different frequency with the radio spectrum or another facility.⁷⁸ FSS licensees may enter into negotiations with co-primary FS services for the purpose of agreeing to terms under which the terrestrial licensees would either relocate or accept a sharing agreement.⁷⁹ If voluntary agreement is not reached within two years (for non-public safety services) or three years (for public safety services), the FSS licensee may relocate the FS user involuntarily. Under involuntary relocation, the satellite user must pay all costs of moving the terrestrial user to replacement facilities, complete all activities necessary to implement the relocation, build the new system, and test the new system.⁸⁰ The replacement facilities must be at least comparable, in terms of throughput, reliability, and operating costs, to the facilities from which the FS user is relocated. After the transition period, FSS licensees will be able to relocate terrestrial incumbents without reimbursing them for their relocation costs.⁸¹

23. Alternately, if the FSS licensee considers the relocation of the FS incumbent too expensive, it must operate within the constraints created by the interference environment that the incumbent FS licensee establishes for a period of ten years.⁸² Under any condition, the “terrestrial fixed service need not relocate until the alternate facilities are available for a reasonable time – in this case, one year – to make adjustments, determine comparability, and ensure a seamless handoff.”⁸³ As indicated above, the FSS licensee must ensure that suitable relocation facilities are available for the FS operator to move to or adjust to the interference resulting from not relocating the FS system.⁸⁴ In either case the burden is not on the FS operator. Because these rules adequately address the economic concerns raised by the IMCC, we do not find that relocation will render the PCO business model unworkable.

24. The IMCC also contends that our relocation policy competitively harms PCOs because it does not permit them to add individual links or make other modifications to their systems from the effective date of the *18 GHz Second Order on Reconsideration* to their relocation date.⁸⁵ Although adding links or making modifications to existing 18 GHz systems is generally prohibited if such modifications increase interference to satellite earth stations, or result in a facility that would be more costly to relocate,⁸⁶ FS licensees may make certain modifications and extensions to their existing systems

⁷⁸ See 47 C.F.R. § 21.901 (2003). Our comparable facilities policy is technology neutral and permits the new entrants to provide any comparable facility to the displaced incumbent. Our policies do not require the displaced incumbent to accept a material change in its regulatory classification (i.e., from a PCO to a cable operator) as a result of the relocation.

⁷⁹ 47 C.F.R. §§ 101.69, 101.71 (2002).

⁸⁰ 47 C.F.R. § 101.91(a) (2002).

⁸¹ 47 C.F.R. § 101.95(a) (2002).

⁸² *18 GHz Second Order on Reconsideration*, 18 FCC Rcd at 24255-56, ¶ 18. See 47 C.F.R. 101.85(b)(1) (2003) (“FS operations in the 18.3-18.58 GHz band that remain co-primary under the provisions of §§ 21.901(e), 74.502(c), 74.602(d), 78.18(a)(4), and 101.147(r) of this chapter will continue to be co-primary with FSS users of this spectrum until November 19, 2012 or the relocation of the fixed service operations, whichever occurs sooner”).

⁸³ *Id.* at 24261-62, ¶ 26.

⁸⁴ See *infra* paragraphs 19-22.

⁸⁵ Petition at 19-20.

⁸⁶ See 47 C.F.R. § 101.83 (2003) (“stations that remain co-primary [in the 18.3-19.3 GHz band] may not make modifications to their systems that increase interference to satellite earth stations, or result in a facility that would be more costly to relocate”).

at 18 GHz during the relocation period, pursuant to section 101.97(a) of the Commission's rules.⁸⁷ Further, PCOs may still submit waiver applications for permission to add new links from existing hubs or add channels to existing links at 18 GHz to accommodate PCO growth,⁸⁸ provided that their waiver applications present circumstances that satisfy our waiver standards.⁸⁹ Specifically, the Commission will entertain waiver requests that, at a minimum, demonstrate that: (1) the proposed modifications consist of adding new links to existing hubs or adding channels to existing links at 18 GHz, (2) such modifications are necessary to accommodate customer growth demands, and (3) it is in the public interest to waive the relevant Commission rules.⁹⁰ These requests should also indicate that the party that submitted the waiver request will bear the additional relocation costs that will arise from these modifications.⁹¹ PCOs may also expand their systems by moving certain links to other available spectrum prior to the relocation of the 18 GHz portion of their operations.⁹² We believe that the availability of these procedures, coupled with the opportunity to relocate new portions of the network in previously unavailable spectrum, and the Commission's relocation policies enhance the ability of PCO operators to compete in the marketplace.

B. Request for Emergency Relief

25. The IMCC also requests immediate relief from our allocation decisions in the *18 GHz Second Order on Reconsideration*. We treat the IMCC's request for emergency relief as a request for a stay. When considering requests for a stay, the Commission follows *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, which provides the relevant standard for determining whether interim injunctive relief or other request for emergency relief should be granted.⁹³ To win a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁹⁴

26. The IMCC's request for emergency relief is based on the same arguments raised in the petition for reconsideration. We have already addressed these arguments and found that they do not provide a sufficient basis for reconsideration. We, similarly, find that these arguments do not provide a

⁸⁷ 47 C.F.R. § 101.97(a) (2003) ("All major modifications and extensions to existing FS systems in the 18.3-18.58 band after November 19, 2003, or in the 18.58-19.30 band after June 8, 2000 (with the exception of certain low power operations authorized under § 101.147(r)(10)) will be authorized on a secondary basis to FSS systems. All other modifications will render the modified FS license secondary to FS operations, unless the incumbent affirmatively justifies primary status and the incumbent FS licensee establishes that the modification would not add to the relocation costs for FSS licensees. . .").

⁸⁸ *But see* 47 C.F.R. § 101.83 (2003) (noting that certain "stations that remain co-primary [in the 18.3-19.3 GHz band] may not make modifications to their systems that increase interference to satellite earth stations, or result in a facility that would be more costly to relocate").

⁸⁹ *See* 47 C.F.R. § 1.3 (2003) ("Any provision of the rules may be waived by the Commission on its own motion or by petition if good cause therefor is shown."); *see also* *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969) (a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest).

⁹⁰ *See, e.g.*, 47 C.F.R. §§ 101.83, 101.97 (2003).

⁹¹ *See* 47 C.F.R. § 101.83 (2003).

⁹² *See CARS Eligibility Order*, at 9930, ¶ 1.

⁹³ *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). *See, e.g.*, *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, Order, 17 FCC Rcd 19746, 19753, ¶ 12 (WTB 2002).

⁹⁴ *Id.*

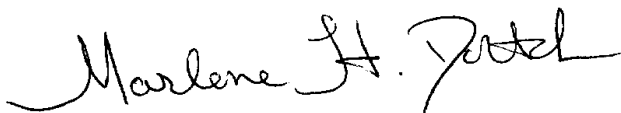
basis upon which emergency relief can be granted. In particular, as we explained above, allocating the 18.3-18.58 GHz band on a primary basis for FSS serves the public interest and furthers our spectrum management goals. Accordingly, we find that the public interest does not favor granting a stay. We, therefore, deny the IMCC's request for emergency relief.

IV. ORDER

27. For the reasons set forth above, IT IS ORDERED that, pursuant to the authority set forth in sections 4(i), 303(b), 303(g), 303(h), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b), 303(g), 303(h), 303(r), 309(j) and 332(a), and Section 1.429 of our rules, 47 C.F.R. § 1.429, the Petition for Reconsideration and Request for Emergency Relief filed by the Independent MultiFamily Communications Council is DENIED.

28. IT IS FURTHER ORDERED that this *Third Order on Reconsideration of the 18 GHz Report and Order* is adopted and that a copy of this *Third Order on Reconsideration of the 18 GHz Report and Order* be sent to the Independent MultiFamily Communications Council via certified mail, return-receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Marlene H. Dortch". The signature is fluid and cursive, with the first name "Marlene" being the most prominent part.

Marlene H. Dortch
Secretary